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59706

EASTERN

BRUNEI

59706

MEASURES TO LEAD TO THE GRANTINGCLOSED C.O.
UNTIL~~1999~~
2000OF A CONSTITUTION.

C.O. 943/1/6

Previous

59706/48

Sir G. Whiteley

7/9

H 531 PUT BY

2/18

Mr. McPetrie

25/9

Sir G. Whiteley

4/10

H 531 PL - BY

Subsequent

1951

H. 531

2/11

Mr. Ashdon.

5/11

11 Legal Lib.

7/11

21 Mr. McPetrie

Mr. Scott.

28/11

Mr. McPetrie.

24/6

Sir Kenneth Roberts-Wray

21/7

Mr. McPetrie

22/7

Mr. Scott H 546

9/8

Mr. McPetrie

9/8

Sir G. Whiteley

11/8

H 431

16/8

H 03

17/8

H 531

5/18

Mr. Scott H 546

6/9

FILE A

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KEET
1949

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1949

Mr. McPetrie.

Mr (1) The High Commissioner brings to our attention certain legal irregularities in the conduct of public affairs in Brunei. We already knew that Brunei has no constitution and no official gazette, but the more serious revelations come as a surprise at least to me.

2. The High Commissioner proposes to put the position right by the following means:

- a) the publication in book form of the enactments passed since 1930 and still in force;
- b) the enactment of an Interpretation and General Clauses Ordinance;
- c) the appointment of a Gov. Printer;
- d) the creation of a Gov. Gazette;
- e) the enactment of ~~the~~ Revised Edition of the Laws Ordinance and a consequent revision of the laws and subordinate legislation in the Sarawak fashion;
- f) the making of a constitution;
- g) the enactment of an Application of Laws Ordinance.

3. All these measures appear desirable in themselves. Can you please say whether

3

whether, from the legal viewpoint. They should be adequate to regularise the position in Brunei and whether we might suggest any changes or additions?

Attached. The Brunei volume should be returned to library as soon as possible, as it is our only copy.

by
R. J. H. H. G.

4. I pass the papers through the legal library for a copy of the existing volume ~~of~~ ^{Brunei} enactments and of the Sarawak laws relating to subparas. 2(b) and 2(c) above.

K. G. P. H. H. G.
5/11.

As I am leaving S. E. Asia Dept. I put the following point on record. Just before leaving for Sarawak, Mr. D. G. Stewart said that he had very little ^{idea} how much he was supposed to intervene in the affairs of Brunei in his capacity as High Commissioner. It occurs to me therefore that it might be good to have some Royal Instructions for Brunei to give the High Commissioner the guidance which he needs. Royal Instructions do, I believe, exist or are being made, to deal exclusively with the Commissioner's defence responsibilities vis-à-vis Brunei, but something more comprehensive appears desirable.

Perhaps the question might be considered after action has been taken on (1)

K. G. P. H. H. G.
5/12.

4

Sir Kenneth Roberts-Wray.

I fear I have held up these papers for a long time. They are the last, as being the least urgent, of the papers which accumulated when I was wholly occupied with the Trinidad constitution.

2. Please see the despatch at (1) from which it appears that Brunei are worried about the validity of some of their laws (which are styled "Enactments").

3. It appears that, subject to the Treaties, the Sultan is an absolute sovereign, and that the law making power must be vested in him. The Council has no legal status, or at least is not provided for in any written law. There is no constitution, or at least no written constitution, for the State, and the form and method of legislating are not prescribed anywhere.

4. Enactments are expressed to be made by the Sultan in Council, and are signed by the British Resident. In actual fact, however, Enactments are sometimes passed by the British Resident in Council, the Sultan himself not being a party to the proceedings, although the Sultan has never expressly delegated his legislative powers to the Resident. Clearly the validity of laws which have been so passed by the Resident in Council is doubtful.

x *To say the least*

Agree

5. By Article 1 of the Supplementary Agreement of 1905/06, the advice of the British Resident must be taken and acted upon "on all questions in Brunei", other than those affecting the Mohammedan religion, and probably the above system of legislation has grown up as a result of this.

6. The enactments from 1906 to 1930 have been collected in a volume stated to have been published "by authority" (presumably the authority of the Sultan), although no statutory authority for the publication was ever given. According to the preface this volume contains all the Enactments in force on the 31st December, 1930. Enactments since 1930 have not been collected and published in volume form, they do not purport to be published "by authority", nor do they bear any printer's name.

7. The High Commissioner now suggests that:-

- ✓ (a) the Enactments since 1930 should be published in a similar volume without revision;
- (b) an Interpretation and General Clauses Ordinance should be enacted in proper form by the Sultan himself in Council, containing a definition of the expression "Sultan in Council", and a provision giving validity to the two volumes;
- ✓ (c) a Government Printer should be appointed, and a Government Gazette should be established and issued. (There is none at present);
- ✓ (d) there should then be a Revised Edition of the Laws Enactment, followed by a Revised Edition;
- (e) the Sultan should then be advised to grant a Constitution.

/ (c)

as regards (c) take
in 'A' of Sir Kenneth
Roberts-Lindsay's
minute

5

(c) and (d) can, I think, be accepted without reservation.

(a) is suggested as an immediate measure to remedy the present unsatisfactory position (despatch para. 7). But the present state of affairs has obtained for many years without disaster, and I should be inclined to risk allowing it to continue for a little longer. I should, therefore, save time by cutting out (a) and push on with (d) - i.e. the Revised Edition.

As suggested in (b) an Interpretation and General Clauses Ordinance should be enacted, but I have two comments on the High Commissioner's proposals in this connection (despatch para. 7):-

- (i) It is not clear why the High Commissioner lays special stress on the fact that the Interpretation Ordinance will contain a definition of "Sultan in Council". Such a definition would, of course, be useful in that it would clarify the meaning of those provisions of written law (such as s. 6 (1) of Enactment No. 1 of 1947) which confer a power on "the Sultan in Council". Such a definition, however, even if read with the enacting words of Brunei laws, would not be sufficient (as the High Commissioner may perhaps think) to establish a particular method for the exercise of the legislative power, since at present the legislative power is not conferred on the Sultan in Council by any written law. If it be desired to prescribe a particular method for the enactment of legislation, an interpretation Ordinance is not the appropriate law by which to make such provision, in any constitution which may be granted, but see comments, in (ii) below.

It would be most
suitable to make the
necessary provision

at B

- (ii) The High Commissioner also suggests that the new Interpretation Ordinance should give validity to the existing Enactments. I think some such provision is desirable. There must certainly be doubt as to the validity of Enactments passed by the Resident in Council in the absence of the Sultan (despatch para. 4). It is necessary to abolish such doubts in respect of:-

A. Laws which have already been enacted by the Resident in Council.

These may be dealt with in the new Interpretation Ordinance. It would be a mistake, however, to admit that the laws in question are necessarily invalid; consequently the validity provision which is inserted in the Interpretation Ordinance should be expressed to be "for the avoidance of doubts". Its exact wording we must leave to the High Commissioner's advisers.

B. Laws which may be enacted by the Resident in Council in the future.

If the enactment of laws by the Resident in Council is intended to be a permanent feature then the validity of such laws could be ensured by the insertion of an appropriate provision in whatever constitution may be granted to the State (see on (e) below). Clearly, however,

/the

A provision validating such laws would be out of place in an Interpretation Ordinance (which appears to be the course suggested in para. 7 of the despatch) and is in any case too important to appear in such an Ordinance. The validation should therefore be effected as proposed in B below. The question whether the validation should be an out-and-out validation, which implies that the laws have been invalid in the past, or whether it should be expressed as a provision "for the avoidance of doubts" can best be decided by the High Commissioner's advisers.

The validation of laws
enacted by the Resident

in the past would also be dealt with in the constitution.

may

the drawing up of a constitution will take a considerable time and it seems, therefore, that if the Resident in Council is to continue on occasion to make laws as he has done in the past, immediate steps are necessary to regularise this process. I suggest, therefore, that at the same time as the new Interpretation Ordinance is enacted the Sultan should also (as an interim measure pending the grant of a constitution) enact a law governing the exercise of his legislative powers which should expressly confer upon the Resident in Council a power to legislate if the Sultan should be absent or unable to act. Exactly what other provisions such a law should contain we are not in a position to say since we do not have sufficient knowledge of conditions in Brunei. It might, however, provide for the constitution and powers of the Council and might also enable the Resident to legislate by himself in any case in which the Sultan declines to follow the Resident's advice, but I doubt if the law would be politically feasible and I know of no precedent for it in a protected state.

This law could also give validation to laws enacted by the Resident in the past.

Y

X →

(e) above suggests that a constitution should be granted by the Sultan. This is a policy question, but if it is decided that a constitution is to be granted, careful enquiry should be made in Brunei to ascertain, if it be possible to get any information upon the point, that the power to grant a constitution does in fact reside in the Sultan. If there is no evidence on this point in Brunei we could probably safely act on the analogy of the States of the Federation of Malaya since constitutions have been granted to all of these. I think that in each case the constitution was, in fact, granted by the Ruler but South-East Asia Department should check this point.]

It should be ascertained whether

This is equally applicable to the Sarawak Constitution in

Take in "B" of Sir Kenneth Roberts-Lindsay's minute

8. In paragraph 10 of the despatch the High Commissioner raised the question of what law the Court should apply in matters which are not covered by any enactment. He presumes that the Court would apply English law in such cases, but rather oddly does not tell us what law the Courts have in fact applied hitherto. He recommends an Application of Laws Enactment on the lines of the Sarawak Bill enclosed with his despatch, and I agree that something of the sort is required. The Penal, Criminal Procedure, and Civil Procedure, Codes and the Evidence Enactment of the former Federal Malay States already applied in Brunei - these are based on Indian legislation, and consideration might perhaps be given to the express application of the Indian Contract Act as being more suitable for a State such as Brunei than English law. I notice incidentally that, although His Majesty is granted exclusive civil and criminal jurisdiction over British subjects and their property by Article VII of the Agreement of 17th September, 1888, this does not appear to be reflected in the Courts Enactment of Brunei (No. 1 of 1908). Do you think, therefore, that either the new Interpretation Ordinance or the new Application of Laws Ordinance referred to above should contain a provision to the effect that the law of Brunei is to be read subject to the provisions

Take in "C" of Sir Kenneth Roberts-Lindsay's minute

7

provisions of the Treaties with His Majesty?

J.C. McPetrie

20th June, 1950.

Mr. McPetrie

I agree with your minute and have only the following additional comments to make.

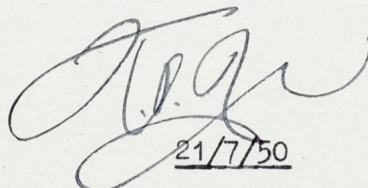
A Paragraph 6. The usual practice is for Colonial laws to purport to be "printed by the Government printers" in order to satisfy the Evidence (Colonial Statutes) Act, 1907. That does not apply to Brunei, but it ~~will~~^{would} be desirable, I think, for them to adopt the same course.

commenting on Paragraph 7(b). It appears to me that the provision for validating doubtful laws should not be in the Interpretation and General Clauses Ordinance. It is much too important and as a transitional enactment I feel it would not be suitable in a law of that sort. I would rather see it in the Revised Edition of the Laws Enactment or, better still, in any law enacted as suggested in your paragraph 7(B) governing the exercise of the Sultan's legislative powers. I suppose it will take some time to work out a constitution (your paragraph 7(e)), but if that were not so this validating provision and the law contemplated in your paragraph 7(B) might be part of the constitution.

commenting on Paragraph 7(e). Let us mention the point in our reply, but I think it is a fairly safe assumption that the Sultan himself has power to grant a constitution. Certainly the Sarawak constitution was granted by the Rajah of Sarawak and he derived his title and presumably his prerogatives from the Sultan of Brunei.

B Paragraph 8. In considering what law to introduce in Brunei, I think we must bear in mind, having regard especially to the proposal for setting up a combined Supreme Court for Sarawak, North Borneo and Brunei, the desirability of keeping the law of the three territories on parallel lines so far as possible. If they can be assimilated to Singapore and the Federation of Malaya so much the better.

C Although the jurisdiction to which you refer is reserved to His Majesty in the Agreement of 1888, it is not now exercised and so far as I know never has been, and I doubt, therefore, whether it is necessary to pursue that particular question.


21/7/50

Mr Scott

8

1. Please see my minute of 24/6 and Sir Kenneth Roberts-Wray's minute of 2/7.

Subject to the views of S.E.A. Dept. on the two points of policy mentioned at X and Y of my minute of 24/6, I think that our reply to the High Commissioner should take the following form -

- i. First restate the High Commissioner's proposals as is done at the beginning of para. 7 of my minute;
 - ii. Then deal with those proposals as in the remainder of para. 7 and the first sentence of para. 8 of my minute. I have shown in pencil the modifications required to this part of my minute in order to take account of the points made by Sir Kenneth Roberts-Wray.
2. As regards a written constitution for Brunei - you will notice that as an interim measure I have suggested in para. 7, head B, of my minute that the Sultan should enact a law governing the exercise of his legislative powers, conferring certain powers on the Resident in Council and defining the constitution and powers of the Council. It may be that such a law would by itself be all the written constitution that Brunei would require. That is a question, however, which will require careful consideration in Brunei and the High Commissioner may consider that, though such a law would suffice as an interim measure, a more elaborate constitution should later be enacted.
 3. It would be advisable for us to see some proposed legislation, constitutional or otherwise, in draft.

Yours faithfully
22/7.

Mr. McPhee

As to X of your most helpful minute of 24th June I fully agree that it is desirable that Brunei shd. have a Constitution & we can approve the High Commissioner's proposal

to advise the Sultan accordingly.

As to Y. It would of course be useful to include a provision making the Brit. Resident to legislate himself in cases where the Sultan declines to follow his advice, but we certainly could not press it from here. Like you I am very doubtful whether such a provision wd. ~~be~~ be politically feasible. But there is no harm in mentioning the point with an indication of our ^{doubts?} ~~doubts~~.

I shd. be grateful if you would scrutinize Mr. Scott's draft which seems to me to embody ^{faithfully} the advice & suggestions of you & Sir R. Roberts Wray's minutes.

G.C. Whiteley
9/8.

Sir G. Whiteley.

On second thoughts I do not think we should even suggest the insertion in the constitution of a power to the Resident to legislate by himself in cases where the Sultan declines to follow his advice. The Sultan is obliged by the Supplementary Agreement of 1905-06 to follow the Resident's advice and it would be very inappropriate for the constitution to anticipate the possibility that the Sultan might fail to honour this obligation; nor can I see the Sultan agreeing to such a provision appearing in the constitution.

I have therefore deleted the last few lines of para. 5 of the draft.

JCH Petrie
9/8.

On further consider.
I entirely agree that it is best to omit all mention of the point.

G.C.W.
10/8.

That is perfectly true

Borneo Des. 20 Confidential

10
17 AUG 1950

any action ref. min. 5/x/49?

R. H. Q. 5/x

Sir G. W. H. H. H.

? Is it desired to follow up
Mr. Ashton's suggestion in his minute of
5/12/49 on this file.

Em H. H.
6/9

~~Mr. H. H. H.~~

~~Mr. H. H. H.~~

As far as I am aware the only information
we have regarding

- a) the relations of H.M. to the State of Borneo &
 - b) the relations ^{and duties} of the High Commissioner to the State of Borneo
- are contained in the Treaties of 1888 & 1905/6,
& in the High Commissioner's Commission, copy of
which is at (26) in 59706/48.

The position is not defined in any great
detail in these documents. ~~it might be of~~
~~advantage~~ Hitherto it does not appear that
any difficulty has arisen through
insufficient definition of the High Commissioner's
powers & duties, but with an eye to the
future it might be as well at least to

11
Examine how far it is possible + politic
to codify these powers + duties in writing
in the form of Royal Instructions as
suggested by in Mr. Ashton's min. of 5/12/49.

I should be glad to have Mr. McPetrie's
advice on this question + on how ~~as~~ it
~~shd.~~ could best be tackled.

G.C. Whiteley
7/9.

14531.
MR. McPetrie is on leave:
B.O. to him in 2 weeks.
G.C.W.
2/9.

Mr. McPetrie

B.M.D. min: 2/11/49.

2/11

Sir G. Whiteley

A { If no difficulty has arisen in the past or
is arising now I should be inclined to
leave well alone and do nothing.

I know of no suitable precedent for
such Instructions as Mr. Ashton suggests
in his minute of 5/12. The Commissioner-
General's Instructions which he mentions
are sui generis and are not apt
for the H.C. Brunei.

J.C. McPetrie
29/9.

A I agree
Puthy G.C.W.
4/10.

B

12
2 ✓
OUR REF: 59706/1

OUR REF: 4/C/207

COLONIAL OFFICE,
The Church House,
Great Smith Street,
London, S.W.1.

BRUNEI

NO. 20

17 August, 1950

CONFIDENTIAL

Sir,

(1) I have the honour to refer to Mr. C. W. Dawson's confidential despatch No. 7 of the 14th October, 1949, on the subject of legislation in the State of Brunei, in which he submitted certain proposals for examination and advice, and to express regret for the delay in replying which has been occasioned by extraordinary pressure of work in my Legal Adviser's office.

2. The proposals were as follows:-

- (a) the Brunei Enactments since 1930 should be published without revision in a volume similar to the 1930 volume of Enactments;
- (b) an Interpretation and General Clauses Ordinance should be enacted in proper form by the Sultan himself in Council, containing a definition of the expression "Sultan in Council", and a provision giving validity to the two volumes of Enactments;
- (c) a Government Printer should be appointed, and a Government Gazette should be established and issued;
- (d) there should then be a Revised Edition of the Laws Enactment, followed by a Revised Edition;
- (e) the Sultan should then be advised to grant a Constitution.

3. Proposal (a) in paragraph 7 of Mr. Dawson's despatch is suggested as an immediate measure to remedy the present unsatisfactory position, but the present state of affairs has obtained for many years without disaster, and could perhaps be allowed to continue for a little longer. It is suggested therefore that proposal (a) might be omitted and proposal (d), for a Revised Edition of the Laws, be put in hand as soon as possible.

4. I agree with proposals (c) and (d). As regards proposal (e), the usual practice is for Colonial Laws to purport to be "printed by the Government Printers" in order to satisfy the Evidence (Colonial Statutes) Act, 1907 and although this does not apply to Brunei it would be desirable to adopt the same course.

5. It is agreed that an Interpretation and General Clauses Ordinance should be enacted as in proposal (b), but I have two comments to make on Mr. Dawson's proposals in this connection:-

- (1) It is not clear why special stress is laid on the fact that the Interpretation Ordinance will contain a definition of "Sultan in Council". Such a definition would, of course, be useful in that it would clarify the meaning of those provisions of written law (such as s.6(1) of Enactment No. 1 of 1947) which confer a power on "the Sultan in Council". Such a definition, however, even if read with the /enacting

THE HIGH COMMISSIONER

FOR BRUNEI.

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enacting words of Brunei Laws, would not be sufficient to establish a particular method for the exercise of the legislative powers, since at present the legislative power is not conferred on the Sultan in Council by any written Law. If it be desired to prescribe a particular method for the enactment of legislation, I am advised that an Interpretation Ordinance is not the appropriate law by which to make such provision, and that this could most suitably be made in any Constitution which may be granted. (In this connection please see also comment at sub-paragraph B. in (ii) below.)

- (ii) It is also suggested in the despatch that the new Interpretation Ordinance should give validity to the existing Enactments, and it is agreed that some such provision is desirable. There must certainly be doubt as to the validity of Enactments passed by the Resident in Council in the absence of the Sultan. It is necessary to abolish such doubts in respect of:-

A. Laws which have already been enacted by the Resident in Council.

A provision validating such laws would be out of place in an Interpretation Ordinance (which appears to be the course suggested in paragraph 7 of the despatch) and is in any case too important to appear in such an Ordinance. The validation I am advised should therefore be effected as proposed in sub-paragraph B. below. The question whether validation should be an out and out validation, which implies that the laws have been invalid in the past, or whether it should be expressed as a provision "for the avoidance of doubts" can best be decided by your Advisers.

B. Laws which may be enacted by the Resident in Council in the future.

If the enactment of laws by the Resident in Council is intended to be a permanent feature then the validity of such laws could be ensured by the insertion of an appropriate provision in whatever Constitution may be granted to the State (see (e) below). The validation of laws enacted by the Resident in the past could also be dealt with in the Constitution. Clearly, however, the drawing up of a Constitution may take a considerable time and it seems therefore, that if the Resident in Council is to continue on occasion to make laws as he has done in the past, immediate steps are necessary to regularise this process. It is therefore suggested that at the same time as the new Interpretation Ordinance is enacted the Sultan should also (as an interim measure pending the grant of a Constitution) enact a law governing the exercise of his legislative powers which should expressly confer upon the Resident in Council a power to legislate if the Sultan should be absent or unable to act. This law could also give validation to laws enacted by the Resident in the past. Exactly what other provisions such a law should contain I am not in a position to say, since sufficient information of conditions in Brunei is not available here. It might, however, provide for the constitution and powers of the Council.

6. I am in full agreement with proposal (e) that the Sultan should be advised to grant a Constitution. In this connection it will be desirable if possible to ascertain whether the power to grant a Constitution does in fact reside in the Sultan, although it seems a fairly safe assumption that the Sultan has this power. Certainly the Sarawak Constitution was granted by the Rajah of Sarawak, and he derived his title, and presumably his prerogatives, from the Sultan of Brunei. On the general question you will no doubt consider whether the interim measure suggested in paragraph 5 B. above would by itself meet Constitutional requirements or whether a more elaborate Constitution should later be enacted.

7. Paragraph 10 of the despatch raises the question of what law the Court should apply in matters which are not covered by any enactment, and presumes that the Court would apply English law in such cases, but does not indicate what law the Courts have in fact applied hitherto. Mr. Dawson recommended an Application of Laws Enactment on the lines of the Sarawak Bill enclosed with his despatch, and it is agreed that something of the sort is required. In considering what law to introduce in Brunei, there should be borne in mind, having regard especially to the proposal for setting up a combined Supreme Court for Sarawak, North Borneo and Brunei, the desirability of keeping the law of the three territories on parallel lines so far as possible. If they can be assimilated to Singapore and the Federation of Malaya so much the better.

8. I should be glad if you would give further consideration to the proposals contained in the despatch under reference in the light of the above comments, and I should be grateful if you would forward in draft form any proposed legislation, constitutional or otherwise, for examination by my legal advisers.

I have the honour to be,

Sir,

Your most obedient,
humble servant,

(Signed) J. GRIFFITHS.

2
15

C. O.

Mr. Scott

Mr. G. Whitley 9/8

Mr. McPhee 9/8

Mr. G. Whitley 11/8

Mr.

Permt. U.S. of S.

Parly. U.S. S.

Minister of State

Secretary of State

17 AUG 1950

Confidential

Your Reference 4/C/207

DRAFT. DESPATCH 20

Sir,

HIS EXCELLENCY THE HIGH
COMMISSIONER FOR BRUNEI.

(1)

I have the honour to ^{refer to} ~~acknowledge the~~
~~receipt of~~ Mr. C. W. Dawson's confidential
despatch No. 7 of the 14th October, 1949,
on the subject of legislation in the State
of Brunei, ^{in which he submitted} ~~submitting~~ certain proposals for
examination and advice.

2. The proposals were as follows :-

(a) ~~The~~ Brunei Enactments since 1930
should be published without revision in a
volume similar to the 1930 ^{volume} ~~book~~ of Enactments;

(b) An Interpretation and General
Clauses Ordinance should be enacted in proper
form by the Sultan himself in Council,
containing a definition of the expression
"Sultan in Council", and a provision giving
validity to the two volumes of Enactments;

(c) A Government Printer should be
appointed, and a Government Gazette should
be established and issued;

(d) There should then be a Revised
Edition of the Laws Enactment, followed by a
Revised Edition;

(e) The Sultan should then be advised to
grant a Constitution.

As regards proposal (c), the usual
/practice

FURTHER ACTION.

Insert "A" overleaf as
a new para. 203
para 3

4 ↑ I agree with proposals (c) and (d).

& to express regret for
the delay in replying which
has been occasioned by
extraordinary pressure of
work in my legal Adviser's
office

practice is for Colonial Laws to purport to be "printed by the Government Printers" in order to satisfy the Evidence (Colonial Statutes) Act, 1907⁴ and although this does not apply to Brunei it would be desirable to adopt the same course. Subject to

~~this proviso proposals (c) and (d) are accepted.~~ ^{in Dawson's in para 7 of despatch}

3 Proposal (a) is suggested as an immediate measure to remedy the present unsatisfactory position (despatch para 7), but the present state of affairs has obtained for many years without disaster, and could perhaps be allowed to continue for a little longer. It is suggested therefore that proposal (a) ^{might} ~~should~~ be ~~cut out~~ ^{omitted} and proposal (d), ^{in a} ~~the~~ Revised Edition of the Laws, be put in hand as soon as possible.

"A"

insert on leaf after para 2

5 It is agreed that an Interpretation and General Clauses Ordinance should be enacted as in proposal (b), but I have two comments ^{to make} on Mr. Dawson's proposals in this connection:-

(1) It is not clear why special stress is laid on the fact that the Interpretation Ordinance will contain a definition of "Sultan in Council". Such a definition would, of course, be useful in that it would clarify the meaning of those provisions of written law (such as s.6(1) of Enactment No. 1 of 1947) which confer a power on "the Sultan in Council". Such a definition, however, even if read with the ^{enacting} ~~enactment~~ words of Brunei Laws, would not be sufficient to

/establish

establish a particular method for the exercise of the legislative powers, since at present the legislative power is not conferred on the Sultan in Council by any written Law. If it be desired to prescribe a particular method for the enactment of legislation, ^(I am advised that) an Interpretation Ordinance is not the appropriate law by which to make such provision, ^{it would} ~~be made~~ ^{which + that this could} ~~be made~~ ^{most suitably} to make the necessary provision in any Constitution which may be granted, ^{subject to the Sultan} ~~but see comments at~~ ^{sub-para} B. in (2) below.)

(In this connection
pl. see also

(2) It is also suggested in the despatch that the new Interpretation Ordinance should give validity to the existing Enactments, and it is agreed that some such provision is desirable. There must certainly be doubt as to the validity of Enactments passed by the Resident in Council in the absence of the Sultan. ~~(Despatch para 4).~~ It is necessary to abolish such doubts in respect of :-

A. Laws which have already been enacted by the Resident in Council.

A provision validating such laws would be out of place in an Interpretation Ordinance (which appears to be the course suggested in para 7 of the despatch) and is in any case too important to appear in such an Ordinance. ^(I am advised) The validation should therefore be effected as proposed in

^{sub-para} B. below. The question whether
/validation

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validation should be an out and out validation, which implies that the laws have been invalid in the past, or whether it should be expressed as a provision "for the avoidance of doubts" can ^{best} then be decided by your Advisers.

B. Laws which may be enacted by the Resident in Council in the future.

If the enactment of laws by the Resident in Council is intended to be a permanent feature then the validity of such laws could be ensured by the insertion of an appropriate provision in whatever Constitution may be granted to the State (see (e) below). The validation of laws enacted by the Resident in the past could also be dealt with in the Constitution. Clearly, however, the drawing up of a Constitution may take a considerable time and it seems therefore, that if the Resident in Council is to continue on occasion to make laws as he has done in the past, immediate steps are necessary to regularise this process. It is therefore suggested that at the same time as the new Interpretation Ordinance is enacted the Sultan should also (as an interim measure pending the grant of a Constitution) enact a law governing the exercises

/of

of his legislative powers which should expressly confer upon the Resident in Council a power to legislate if the Sultan should be absent or unable to act. This law could also give validation to laws enacted by the Resident in the past. Exactly what other provisions such a law should contain I am not in a position to say, since sufficient ~~information~~ ^{prevailing} knowledge of conditions in Brunei is not available here. It might, however, provide for the Constitution and powers of the Council, and might also enable the Resident to legislate by himself in any case in which the Sultan declined to follow the Resident's advice. It ^{is very} seems doubtful ~~whether the latter provision~~ however if that part of the law would be politically feasible, and there is so far as I am aware no to my knowledge no known precedent for it in a protected State.

* as to which you will no doubt advise me,

I am in full agreement with proposal (e) that the Sultan should be advised to grant a Constitution. In this connection it will be desirable ^{if possible} to ascertain

6. ~~the grant of a Constitution by the Sultan (proposal (e)) is a question of policy, and if it is decided that a Constitution is to be granted it should be ascertained whether the power to grant a Constitution does in fact reside in the Sultan,~~ ^{although} a It seems a fairly safe assumption that the Sultan has this power. Certainly the Sarawak Constitution was granted by the Rajah of Sarawak, and he derived his title, and presumably his prerogatives, from the Sultan of Brunei.

On the general question ~~whether the~~ ^{whether the} you will no doubt ~~carefully~~ ^{carefully} consider whether the interim measure suggested in para 5 B above would by itself meet Brunei Constitutional requirements or whether a more elaborate Constitution shd. later be enacted.)

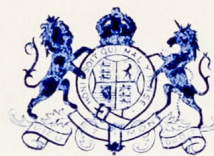
7. Para 10 of the despatch raises the question of what law the Court should apply in matters which are not covered by any enactment, and presumes that the Court would apply English law in such cases, but does not indicate what law the Courts have in fact applied hitherto. ^{The despatch} ~~Mr. Dawson~~ recommended an Application ~~of~~ Laws Enactment on the lines of the Sarawak Bill enclosed with his despatch, and it is agreed that something of the sort is required. In considering what law to introduce in Brunei, there should be borne in mind, having regard especially to the proposal for setting up a combined Supreme Court for Sarawak, North Borneo and Brunei, the desirability of keeping the law of the three territories on parallel lines so far as possible. If they can be assimilated to Singapore and the Federation of Malaya so much the better.

8. I should be glad if you would give further consideration to the proposals contained in the despatch under reference in the light of the ^{above} ~~comments~~ ^{there} ~~contained in~~ ~~this despatch~~, and I should be grateful if you would forward any proposed legislation, constitutional or otherwise, in draft form ~~before it is enacted~~ ^{for examination by} my legal advisers.

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N.F.

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CONFIDENTIAL

Telegraphic Address :—
"HIGHCOMA KUCHING"

OFFICE OF HIS EXCELLENCY
THE HIGH COMMISSIONER
FOR BRUNEI.

Ref: 4/C/207

BRUNEI

NO.7.

14th October 1949

Sir,

I have the honour to inform you that my attention has recently been drawn to the unsatisfactory position which exists in regard to the legislation at present in force and which may be enacted from time to time in the State of Brunei. Since the High Commission for Brunei was vested in the Governor of Sarawak, the Attorney-General of Sarawak, Mr. Grattan-Bellew, has addressed his attention to this matter and has now provided me with his considered views.

2. In so far as can be ascertained the Sultan of Brunei is an autocratic sovereign, and he alone (unless he delegates his powers) can make laws for the Government of his State.

3. No written laws appear to have been enacted (saving the Treaties made with England) before 1906. The first British Adviser was appointed in that year and laws then apparently began to be enacted in written form. According to the printed copies of the Enactments the same enacting words have been used since 1906 until the present day, namely, "It is hereby enacted by His Highness the Sultan in Council as follows:-". Each Enactment was, and still is, signed at the top by the Resident. This signature appears in the place usually reserved for the signature of "assent". The words "I assent" are, however, not used, and the Resident's signature may therefore merely be taken as testifying to the fact that the Enactment has in fact been passed by the Sultan in Council.

4. Brunei has no Constitution, and, although the Annual Report on the State for 1948 affirms that the Assent of the Council is required for the enactment of legislation, no authority for the statement can be found, and it can only be presumed that this was the arrangement made by the Resident and the Sultan, following upon the 1906 Treaty. Enactments in this form, if in fact enacted by the Sultan himself in Council, are, of course, law in the State; but if Enactments are passed, in the absence of the Sultan, by the Resident in Council, as apparently has been the case more often than not since the war, doubts must be felt regarding their validity.

5. The Sultan has not expressly delegated his legislative powers to the Resident, but, even if he had, difficulty arises, as the printed copies of the Enactments do not purport to be passed by the Resident in Council.

6./.....

The Rt. Honourable A. Creech Jones,
P.C., M.P., etc., etc.,
Colonial Office,
LONDON?

6. Enactments between 1906 and 1930 were revised and collated together in one book. There seems to be no statutory authority for this publication, although the book purports to be issued "by authority". This presumably means by the authority of the Sultan. The Court judicially notices all public statutes, and there is probably no doubt that the Court would accept the book of collected Enactments as authentic. Doubts however will arise if a printed copy of an Enactment subsequent to 1930 should be produced in Court and be challenged by a party to a proceeding. The Court might not be prepared to accept it as authentic in view of the position which I have outlined above. Further the printed copies of these Enactments do not purport to be printed by authority and do not bear any printer's name. There is no Government Gazette in Brunei, and it would seem that if an Enactment were to be challenged in Court it would, at the least, be necessary to produce a copy certified by the Resident in person. If the Enactment were also challenged on the ground that it was not in fact passed by the Sultan in Council it would also be necessary to prove that the Sultan had in some way delegated his legislative powers or that he had himself assented to the Enactment at some stage.

7. It seems that, as an immediate measure to remedy this unsatisfactory position, the Enactments passed subsequent to 1930 and not repealed should be published in book form (without revision) similar to the 1930 book of Enactments, if this can be done within a reasonable time, and an Interpretation and General Clauses Ordinance enacted in proper form by the Sultan himself in Council. This Enactment should contain a definition of "Sultan in Council", for example, "Sultan in Council means the Sultan acting with the advice of the Council but not necessarily in the Council assembled", and a provision giving validity to the two books of Enactments. At the same time a Government Printer should be appointed, and steps should be taken to issue a Government Gazette.

8. The next step should be to pass a Revised Edition of the Laws Enactment and then to revise all the Enactments and Rules and Regulations of the State of Brunei. Once this has been done all doubt regarding the validity of the old Enactments would be permanently removed. If the proposals regarding the further employment of Mr. Hedges, made in my Staff Despatch No. 21 of 11th August, 1949, are approved, this work could be undertaken when the revision of the Sarawak legislation is completed.

9. Subsequently the Sultan should be advised to grant a Constitution.

10. While I am discussing the question of Brunei legislation I should, I think, inform you that in Brunei no legislative provision exists as to the law which should be applied in respect of matters which are not covered by any Enactment. The Federated Malay States' Law Adoption Enactment of 1939 applies in Brunei the Penal, Criminal Procedure and Civil Procedure Codes, and the Evidence Enactment of the former Federated Malay States; but no provision is made in respect of such important subjects as Sale of Goods, Negotiable Instruments, Torts and Trustees. The Courts, when such matters arise,

probably/.....

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----- probably apply English Law, although there is no authority for their so doing. It seems that an Enactment similar to the Application of Laws Bill which will be introduced at the next meeting of Council Negri (a copy of which is attached hereto) should also be introduced in Brunei.

11. I think you will agree that these matters which fundamentally affect the legal and constitutional position in Brunei should be examined, and I should be very grateful for your advice and comments on the points which I have raised. It may well be that no question would be raised or challenge made for years to come, but, as High Commissioner for Brunei, I am not happy about the position, and would like it to be put on a proper footing as soon as possible. In view of the possibility of further proceedings in the case of Brooke vs. Brooke in which the Courts and Enactments of Brunei may be involved it seems more than ever necessary that any doubts which exist should be quickly resolved.

I have the honour to be,

Sir,

Your obedient Servant,

G. Dawson

High Commissioner for Brunei

24

No. S 118—The following Ordinance passed at a meeting of the Council Negri held on the 22nd day of November, 1949, and assented to by His Excellency the Governor on the 25th day of November, 1949, is published for general information:—

COLONY OF SARAWAK.

No. 27 of 1949.

I assent,

D. G. STEWART,

Governor and Commander-in-Chief.

25th November, 1949.

LS

An Ordinance to amend and consolidate the law relating to the application in the Colony of the Common Law of England, the doctrines of equity and statutes of general application.

[12th December, 1949.]

Enacted by the Governor of Sarawak with the advice and consent of the Council Negri—

1. This Ordinance may be cited as the Application Short title.
of Laws Ordinance, 1949.

2. Subject to the provisions of this Ordinance and save in so far as other provision has been or may hereafter be made by any written law in force in the Colony, the common law of England and the doctrines of equity, together with statutes of general application, as administered or in force in England at the commencement of this Ordinance, shall be in force in the Colony:

Application of common law, doctrines of equity and statutes of general application.

Provided that the said common law, doctrines of equity and statutes of general application shall be in force in the Colony so far only as the circumstances of the Colony and of its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary.

Proviso.

3. Without prejudice to the generality of the provisions of section 2 of this Ordinance and in amplification thereof, the Acts of the Parliament of the United Kingdom specified in the Schedule to this Ordinance shall, to the extent specified in the second column of the said Schedule, be in force in the Colony as from the date specified in the third column of the said Schedule, with

Application of Acts specified in Schedule.

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such formal alterations and amendments as may be necessary to make the same applicable to the circumstances of the Colony and, in particular, subject to the modifications set forth in the fourth column of the said Schedule.

Power to
amend, vary
or add to
Schedule.

4. The Council Negri may, by resolution, amend or vary the Schedule to this Ordinance and may add thereto any Act of the Parliament of the United Kingdom whether enacted before or after the commencement of this Ordinance.

Repeal.

5. The Law of Sarawak Ordinance is hereby *Cap. 1.* repealed.

SCHEDULE.

<i>Short title.</i>	<i>Extent of application.</i>	<i>Date of coming into force in the Colony.</i>	<i>Modifications.</i>
Law Reform (Contributory Negligence) Act, 1945.	The whole, except sections 5 and 6.	15th June, 1945.	(i) In subsection (7) of section 1 the reference to the Carriage by Air Act, 1932, shall be read as a reference to the Carriage by Air Ordinance (<i>Cap. 91</i>). (ii) In sections 2 and 4, the references to the Workmen's Compensation Acts, 1925 to 1943 and to sections thereof shall be read as references to the Workmen's Compensation Ordinance, 1949 (<i>Ordinance No. 4/49</i>) and to the corresponding sections thereof.
Law Reform (Personal Injuries) Act, 1948.	Sections 1, 3, 4 and subsection (1) of section 6.	30th June, 1948.	Section 1 shall apply only where the cause of action accrues on or after the 30th June, 1948.

Passed this 22nd day of November, 1949.

R. F. MOLE,
Clerk of Council Negri.

intituled

An Ordinance to amend and consolidate the law relating to the application in the Colony of the Common Law of England, the doctrines of equity and statutes of general application.

Enacted by the Governor of Sarawak with the advice and consent of the Council Negri -

Short title.

1. This Ordinance may be cited as the Application of Laws Ordinance, 1949.

Application of common law, doctrines of equity and statutes of general application.

2. Subject to the provisions of this Ordinance and save in so far as other provision has been or may hereafter be made by any written law in force in the Colony, the common law of England and the doctrines of equity, together with statutes of general application, as administered or in force in England at the commencement of this Ordinance, shall be in force in the Colony:

Proviso.

Provided that the said common law, doctrines of equity and statutes of general application shall be in force in the Colony so far only as the circumstances of the Colony and of its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary.

Application of Acts specified in Schedule.

3. Without prejudice to the generality of the provisions of section 2 of this Ordinance and in amplification thereof, the Acts of the Parliament of the United Kingdom specified in the Schedule to this Ordinance shall, to the extent specified in the second column of the said Schedule, be in force in the Colony as from the date specified in the third column of the said Schedule, with such formal alterations and amendments as may be necessary to make the same applicable to the circumstances of the Colony and, in particular, subject to the modifications set forth in the fourth column of the said Schedule.

Power to
amend, vary
or add to
Schedule.

4. The Council Negri may, by resolution, amend or vary the Schedule to this Ordinance and may add thereto any Act of the Parliament of the United Kingdom whether enacted before or after the commencement of this Ordinance.

Repeal.

5. The Law of Sarawak Ordinance is hereby Cap.1. repealed.

SCHEDULE

<u>Short title</u>	<u>Extent of application</u>	<u>Date of coming into force in the Colony.</u>	<u>Modifications</u>
Law Reform (Contributory Negligence) Act, 1945.	The whole except sections 5 and 6.	15th June, 1945.	(i) In subsection (7) of section 1 the reference to the Carriage by Air Act, 1932, shall be read as a reference to the Carriage by Air Ordinance (<u>Cap. 91</u>) (ii) In sections 2 and 4, the references to the Workmen's Compensation Acts, 1925 to 1943 and to sections thereof shall be read as references to the Workmen's Compensation Ordinance, 1949 (<u>Ordinance No. 4/49</u>) and to the corresponding sections thereof.
Law Reform (Personal Injuries) Act, 1948.	Sections 1, 3, 4 and subsection (1) of section 6.	30th June 1948	Section 1 shall apply only where the cause of action accrues on or after the 30th June, 1948.

I fear I have held up these papers for a long time. They are the last, as being the least urgent, of the papers which accumulated when I was wholly occupied with the Trinidad constitution.

2. Please see the despatch at (1) from which it appears that Brunei are worried about the validity of some of their laws (which are styled "Enactments").

3. It appears that, subject to the Treaties, the Sultan is an absolute sovereign, and that the law making power must be vested in him. The Council has no legal status, or at least is not provided for in any written law. There is no constitution, or at least no written constitution, for the State, and the form and method of legislating are not prescribed anywhere.

4. Enactments are expressed to be made by the Sultan in Council, and are signed by the British Resident. In actual fact, however, Enactments are sometimes passed by the British Resident in Council, the Sultan himself not being a party to the proceedings, although the Sultan has never expressly delegated his legislative powers to the Resident. Clearly the validity of laws which have been so passed by the Resident in Council is doubtful.

5. By Article 1 of the Supplementary Agreement of 1905/06, the advice of the British Resident must be taken and acted upon on all questions in Brunei, other than those affecting the Mohammedan religion, and probably the above system of legislation has grown up as a result of this.

6. The enactments from 1906 to 1930 have been collected in a volume stated to have been published "by authority" (presumably the authority of the Sultan), although no statutory authority for the publication was ever given. According to the preface this volume contains all the Enactments in force on the 31st December, 1930. Enactments since 1930 have not been collected and published in volume form, they do not purport to be published "by authority", nor do they bear any printer's name.

7. The High Commissioner now suggests that:-

- (a) the Enactments since 1930 should be published in a similar volume without revision
- (b) an Interpretation and General Clauses Ordinance should be enacted in proper form by the Sultan himself in Council, containing a definition of the expression "Sultan in Council", and a provision giving validity to the two volumes;
- (c) a Government Printer should be appointed, and a Government Gazette should be established and issued. (There is none at present);
- (d) there should then be a Revised Edition of the Laws Enactment, followed by a Revised Edition;
- (e) the Sultan should then be advised to grant a Constitution.

(c) and (d) can, I think, be accepted without reservation.

(a) is suggested as an immediate measure to remedy the present unsatisfactory position (despatch para. 7). But the present state of affairs has obtained for many years without disaster, and I should be inclined to risk allowing it to continue for a little longer. I should, therefore, save time by cutting out (a) and push on with (d) - i.e. the Revised Edition.

As suggested in (b) an Interpretation and General Clauses Ordinance should be enacted, but I have two comments on the High Commissioner's proposals in this connection (despatch para. 7):-

- (i) It is not clear why the High Commissioner lays special stress on the fact that the Interpretation Ordinance will contain a definition of "Sultan in Council". Such a definition would, of course, be useful in that it would clarify the meaning of those provisions of written law (such as s. 6 (1) of Enactment No. 1 of 1947) which confer a power on "the Sultan in Council". Such a definition, however, even if read with the enacting words of Brunei laws, would not be sufficient (as the High Commissioner may perhaps think) to establish a particular method for the exercise of the legislative power, since at present the legislative power is not conferred on the Sultan in Council by any written law. If it be desired to prescribe a particular method for the enactment of legislation, an Interpretation Ordinance is not the appropriate law by which to make such provision, in any constitution which may be granted, but see comments, in (ii) below.

*It would be most suitable
to make the necessary provision*

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- (ii) The High Commissioner also suggests that the Interpretation Ordinance should give validity to the existing Enactments. I think some such provision is desirable. There must certainly be doubt as to the validity of Enactments passed by the Resident in Council in the absence of the Sultan (despatch para. 4). It is necessary to abolish such doubts in respect of:-

A. Laws which have already been enacted by the Resident in Council.

These may be dealt with in the new Interpretation Ordinance. It would be a mistake, however, to admit that the laws in question are necessarily invalid; consequently the validity provision which is inserted in the Interpretation Ordinance should be expressed to be "for the avoidance of doubts". Its exact wording we must leave to the High Commissioner's advisers.

B. Laws which may be enacted by the Resident in Council in the future.

If the enactment of laws by the Resident in Council is intended to be a permanent feature then the validity of such laws could be ensured by the insertion of an appropriate provision in whatever constitution may be granted to the State (see on (e) below). Clearly, however,

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the drawing up of a constitution will take a considerable time and it seems, therefore, that if the Resident in Council is to continue on occasion to make laws as he has done in the past, immediate steps are necessary to regularise this process. I suggest, therefore, that at the same time as the new Interpretation Ordinance is enacted the Sultan should also (as an interim measure pending the grant of a constitution) enact a law governing the exercise of his legislative powers which should expressly confer upon the Resident in Council a power to legislate if the Sultan should be absent or unable to act. Exactly what other provisions such a law should contain we are not in a position to say since we do not have sufficient knowledge of conditions in Brunei. It might, however, provide for the constitution and powers of the Council and might also enable the Resident to legislate by himself in any case in which the Sultan declines to follow the Resident's advice, but I doubt if the law would be politically feasible and I know of no precedent for it in a protected state.

(e) above suggests that a constitution should be granted by the Sultan. This is a policy question, but if it is decided that a constitution is to be granted, careful enquiry should be made in Brunei to ascertain, if it be possible to get any information upon the point, that the power to grant a constitution does in fact reside in the Sultan. If there is no evidence on this point in Brunei we could probably safely act on the analogy of the States of the Federation of Malaya since constitutions have been granted to all of these. I think that in each case the constitution was, in fact, granted by the Ruler but South-East Asia Department should check this point.

8. In paragraph 10 of the despatch the High Commissioner raised the question of what law the Court should apply in matters which are not covered by any enactment. He presumes that the Court would apply English law in such cases, but rather oddly does not tell us what law the Courts have in fact applied hitherto. He recommends an Application of Laws Enactment on the lines of the Sarawak Bill enclosed with his despatch, and I agree that something of the sort is required. The Penal, Criminal Procedure, and Civil Procedure, Codes and the Evidence Enactment of the former Federal Malay States already applied in Brunei - these are based on Indian legislation, and consideration might perhaps be given to the express application of the Indian Contract Act as being more suitable for a State such as Brunei than English law. I notice incidentally that, although His Majesty is granted exclusive civil and criminal jurisdiction over British subjects and their property by Article VII of the Agreement of 17th September, 1888, this does not appear to be reflected in the Courts Enactment of Brunei (No. 1 of 1908). Do you think, therefore, that either the new Interpretation Ordinance or the new Application of Laws Ordinance referred to above should contain a provision to the effect that the law of Brunei is to be read subject to the /provisions

provisions of the Treaties with His Majesty?

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END

J.C. McPetrie.

24th June, 1950.

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Measures to Lead to the Granting of a Constitution. 1949. MS
Records of the British Colonial Office CO 943/1/6. The National
Archives (Kew, United Kingdom). State Papers Online Colonial,
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[u=omni&sid=bookmark-SPOC&pg=1](https://link.gale.com/apps/doc/FTABTY297308913/SPOC?u=omni&sid=bookmark-SPOC&pg=1). Accessed 20 Dec. 2024.